

RACHEL MATHEWS

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v.

BASF (M) SDN BHD & ANOR

HIGH COURT, KUALA LUMPUR

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MOHAMAD ARIFF YUSOF J

[JUDICIAL REVIEW NO: R3-25-311-2008]

4 NOVEMBER 2009

LABOUR LAW: *Industrial Court - Award of dismissal - Judicial review - Industrial Court found domestic inquiry process flawed but ruling that dismissal was justified - Whether decision sustainable - Whether had properly applied law to facts of case - Whether applicant truly guilty of gross misconduct*

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The applicant, who held a senior position in a company, was dismissed from her employment after being implicated in a plot to add certain unknown substances into the drinks of the Managing Director of the company. When the matter of the dismissal came before the Industrial Court, the learned Chairman took the view that the company, in conducting the domestic inquiry, had ignored the rules of natural justice and further failed to exercise even the minimum standards of decency for the inquiry. More specifically, the inquiry was likened by the Industrial Court to that of a 'Kangaroo Court'. The criticism and censure notwithstanding, the Industrial Court, upon a consideration *de novo* of the matter, held that the applicant was guilty of a serious misconduct which violated the trust reposed in her, and on that score, ruled her dismissal justified. Dissatisfied, the applicant adverted to the present judicial review application. Before the learned Judicial Commissioner, a question *inter alia* arose as to whether an unfair domestic inquiry process could be cured or remedied by a full inquiry during the proceedings in the Industrial Court, and if so, whether the Industrial Court below was right in deciding the way it did.

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Held (dismissing application; affirming the Industrial Court):

- (1) Reading the record and in particular the award of the Industrial Court, it is evident that the Industrial Court has properly applied the law to the facts. (para 6)

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- A (2) The cases suggest that if a domestic inquiry is conducted fairly, the result thereof would be treated as *prima facie* evidence of proven misconduct. That certainly was not the case here. However, the Industrial Court in this case had
- B scrutinized the matter *de novo*, and that being so it could validly come to its own conclusion as to whether the employee has or has not been guilty of misconduct and dismissed with just cause or excuse. (para 5)
- C (3) The finding as made by the Industrial Court after a full hearing before it could not be said to suffer from any error of law or jurisdictional flaw. While one may sympathise with the applicant in the treatment meted out to her after the hastily-convened domestic inquiry, the facts nevertheless disclosed that what she did was a serious misconduct which had an
- D adverse effect on the confidence of trust reposed in her by the company. That, as rightly ruled by the Industrial Court, justified her dismissal. (para 7)

Case(s) referred to:

- E *Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court of Malaysia* [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39 (**refd**)
Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC (**refd**)
Workmen of the Motipur Sugar Factory v. Motipur Sugar Factory Pte Ltd AIR [1965] SC 1803 (**refd**)
- F For the appellant - Sandosh Anandan; M/s Sandosh Anandan
For the 1st respondent - T Thavalingam; Zaid Ibrahim & Co
Reported by Wan Sharif Wan Ahmad

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JUDGMENT

Mohamad Ariff Yusof J:

- H [1] On the facts of this judicial review application, the applicant had been dismissed as the Corporate Communications Manager of BASF (Malaysia) Sdn Bhd by reason of misconduct after what appeared to be a hastily arranged Domestic Inquiry which was described by the Industrial Court as “a Kangaroo Court”. The
- I rules of natural justice were ignored by the company, and the treatment meted out to the claimant was likened by the Industrial

Court Chairman as not meeting “the minimum standards of decency.” This was how the Industrial Court Chairman described the inquiry: A

The inquiry which was held by the Company was in fact a Kangaroo Court. In breach of the rules of natural Justice, it was headed by the Managing Director, the accuser. A decision had already been taken to dismiss the Claimant, if she could not give an acceptable explanation for the conduct, even before the inquiry. The Claimant was not given any notice of the charges against her, prior to the inquiry. The Claimant was in a state of shock on hearing the accusations for the first time at the inquiry and was ill-prepared to give an explanation. The enquiry ended within 10 to 15 minutes and the Claimant was escorted out on the Company’s premises like a common criminal by the Company Security Officer. The whole episode left the Claimant shell-shocked and traumatized such that she could not bring herself to seek re-employment for two years, after the dismissal. She then decided to relocate Australia and has now secured employment as a workplace adviser. B
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[2] The misconduct itself arose from the discovery by the Company of certain e-mail messages between the applicant and two of her colleagues. One was the Executive Secretary (Sarimah) of the Managing Director (Jamie Mendoza) and the other the Manager of Human Resources of the Company (Azleena). The e-mail messages themselves were discovered when Azleena left the company and she was required to provide the company with the computer and all e-mail messages. She had deleted the offensive e-mail messages within herself and the applicant as well as Sarimah, but the IT Department of the company, sensing that something was amiss, managed to retrieve the messages. These messages included some insulting references to the Managing Director, Mendoza, and the reference to the spiking of drinks for Mendoza by Sarimah with what was described as “air Pak Sih”. The relevant part of one particular offending e-mail message from the applicant to Sarimah read as follows: E
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Entah Problem apa, di bawa-bawa ke office! Please take triple dose of Pak Sih’s air bila buat air nanti! And pastikan its before I see him! H

[3] This was the main ground for the dismissal of the claimant and in the letter of termination, the company referred to it in these terms: I

- A** The content of the e-mail implicates you in a scheme/plot to add certain unknown substances into the drinks of the Managing Director of the Company. At the very least, you are fully aware of the scheme/plot, but nothing to stop it. You had in fact encouraged Sarimah to put in a triple dose of the unknown substance referred to as “Pak Sih’s air” into the Managing Director’s drinks ...
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- C** You were given the opportunity to explain your conduct above during the course of the said meeting. You have failed to offer any reasonable explanation in respect of the same leaving us with no other alternative but to take disciplinary action against you. Noting the senior position that you hold in the Company and the nature of your conduct, we can no longer repose the necessary trust and confidence in you to effectively discharge your duties as a Company’s Corporate Communications Manager. In the circumstances, your services with the Company is hereby terminated with immediate effect ...
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- E** [4] The facts of this application raise yet again the parameters of judicial review jurisdiction, namely the application of the general principle that judicial review jurisdiction is concerned only with the decision-making process in the main, but where irrationality, manifest unreasonableness or proportionality is taken as an issue, the court can explore the merits of the position but only to the extent of establishing that irrationality or manifest unreasonableness, or latterly on the ground of proportionality. Irrationality or proportionality are not grounds raised in this application. The issue on the facts of this application revolves around the question whether the applicant was dismissed with just cause or excuse. As is sometimes described in the cases, the Industrial Court has to consider whether the employee is guilty of misconduct, and secondly, once that is determined, whether the employee has been dismissed with just cause or excuse. Obviously, in terms of the decision-making process, it has to be fair and in compliance with the rules of natural justice, with a view to preserving industrial harmony.
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- H** [5] The other main issue on the facts of this judicial review application concerns the question whether an unfair Domestic Inquiry process can be cured or remedied by a full and fair inquiry during the proceedings in the Industrial Court. As I indicated

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earlier, even the Industrial Court categorized the Domestic Inquiry on the facts of this case as a “Kangaroo Court”. The cases suggest that if a Domestic Inquiry is conducted fairly, the result would be treated as *prima facie* evidence of proven misconduct. That certainly was not the case here. However, the Industrial Court in this case scrutinized the matter *de novo*, and on the strength of the case law, the Industrial Court can validly come to its own conclusion on the facts and evidence whether the employee has or has not been guilty of misconduct and dismissed with just cause or excuse. See for example the principles established in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344; *Dreamland Corp. (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court of Malaysia* [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39 and the Supreme Court of India decision in *Workmen of the Motipur Sugar Factory v. Motipur Sugar Factory Pte. Ltd.* AIR [1965] SC 1803. In the *Dreamland Corp Bhd* case, the Federal Court quoted with approval the passage the judgment in the *Workmen of the Motipur Sugar Factory* case, where it was stated:

Where an employer has failed to make an inquiry before dismissing or discharging a workman it is open to him to justify his action before the Tribunal by leading all relevant evidence before it. The entire matter would be open before the Tribunal The important effect of omission to hold on inquiry is merely that the Tribunal would not have to consider only whether there was a *prima facie* case but would have to decide for itself on the evidence adduced whether the charges have really been made out. (At p. 114 of the report)

[6] Applying this principle to the facts of this instant application, as a review court I have to enquire whether the Industrial Court has, or has not, satisfied this requirement, and reading the record and in particular the award of the Industrial Court Chairman, it is evident that the Industrial Court has properly applied the law to the facts. To quote the relevant passages in the award:

In cross-examination, the Claimant admitted she had knowledge that Sarimah had put an unknown substance in the drink of the Managing Director to calm him down but did not know whether it was detrimental to the Managing Director’s Health. In any event, she admitted that it was wrong to do this and this was the Company’s main complaint against her ...

A What is surprising in this case is that the Claimant who is an intelligent person and an experienced senior staff should see it fit to entertain e-mails from a subordinate staff, disparaging her own boss ... as a Senior Executive, she should have put a stop to it immediately. By condoning it, she only encouraged it ...

B What is fundamental is that the Claimant by her conduct had contravened the implied term of trust and confidence in the contract of employment. The Claimant as a Senior Executive should have known what was expected of her by the Company.

C In conclusion, it is the finding of the court that the Claimant in encouraging Sarimah to put an unknown substance into the drink of the Managing Director, has committed a serious misconduct, which violated the confidence and trust which the Company had reposed in her and thereby justifying the dismissal. Accordingly, for the reasons given, it is the finding of the court that the

D dismissal is for just cause and excuse.

E [7] Such a finding by the Industrial Court after a full hearing before it cannot be said to suffer from any error of law or jurisdictional flaw. While one can sympathise with the applicant in the treatment meted out to her after the hastily-convened domestic inquiry, the facts nevertheless disclosed that what she did was a serious misconduct which had an adverse effect on the confidence and trust reposed in her by the company. That, according to the Industrial Court justified her dismissal, and rightly so.

F [8] By reason of the above, I dismiss this application for judicial review with costs to be taxed, unless agreed.

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